

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 525
3105633

BETWEEN PETER VAN KUYK
 Applicant

AND KENDERDINE
 ELECTRICAL LIMITED

Member of Authority: Robin Arthur

Representatives: Tony Pietras, counsel for the Applicant
 Justine Foden, advocate for the Respondent

Investigation Meeting: 23 February and 27 August 2021

Submissions: On 23 February and 27 August 2021 from the
 Applicant and the Respondent

Determination: 25 November 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 30 March 2020 Kenderdine Electrical Limited (KEL) advised Peter Van Kuyk that his position as its workshop supervisor was to be disestablished and no other role was available for him. KEL then identified two options for ending Mr Van Kuyk's employment. One was to pay him the two week notice redundancy period set in his employment agreement. The other, if he agreed, was for his notice to run over an extended 12-week period, with KEL seeking a Covid-19 emergency wage subsidy for his role, paying him in full for the first two weeks and the following 10 weeks at the subsidy rate of \$585.80 before tax. KEL's letter setting out those options noted that if Mr Van Kuyk got another job and resigned during the period he received the subsidy amount, the company was required to report the change of circumstances to the government and payment of the subsidy would stop.

[2] KEL made this proposal to Mr Van Kuyk five days after New Zealand had entered the Covid-19 Alert Level 4 lockdown which ran from 25 March to 27 April 2020. The lock down was implemented under the state of national emergency, also declared on 25 March 2020, in response to the Covid-19 pandemic. The state of emergency, with several extensions, then ran until 13 May 2020 when the country moved to Alert Level 2.

[3] Mr Van Kuyk promptly raised a personal grievance about KEL's decision to disestablish his position and its proposal to provide an extended notice period by seeking a wage subsidy. A letter from his lawyer to KEL, dated 1 April 2020, identified two grounds for his grievance.

[4] Firstly, Mr Van Kuyk said he was deprived of an opportunity to provide feedback about the prospect of redundancy before the decision was made. A letter KEL's general manager Ruthe Kenderdine sent him on 27 March, saying redundancy of his position was being considered, said he had until noon on Tuesday, 31 March to provide any feedback. Mr Van Kuyk said he had prepared a letter to provide his feedback by that 31 March deadline but had not sent it by the time he was told on 30 March that the decision had been made.

[5] Secondly, he said the Covid-19 wage subsidy was claimable for an employee only where a business would seek to keep the person employed, not to pay out a pre-determined notice period. His grievance letter said KEL's proposal, if implemented, appeared to "amount to fraud against the scheme".

[6] Ms Kenderdine responded promptly to the grievance letter sent to her by Mr Van Kuyk's lawyer. In an email sent three hours later she described a telephone conversation she had with Mr Van Kuyk on 27 March about the prospect of redundancy.

[7] Ms Kenderdine wrote that, after listening to her explanation of why the company was having to consider disestablishing some positions, Mr Van Kuyk told her he had been expecting something like this and understood the need to do so in the circumstances. She described Mr Van Kuyk as being "extremely gracious and kind" in that conversation. She said she had not anticipated any further feedback from him because what he said had "left me with the absolute impression that he fully understood and accepted the company's proposal".

[8] Later that same day, 27 March, the government had announced more details about how the wage subsidy scheme was intended to operate. Ms Kenderdine said another employee, also being consulted about the prospect of redundancy, suggested those details meant the company could do more to offset the impact of redundancy on its employees. She said the second option offered to Mr Van Kuyk, about seeking a wage subsidy, was made after researching the other employee's suggestion and "was within the spirit of that scheme".

[9] In her 1 April email Ms Kenderdine wrote that she knew Mr Van Kuyk's agreement to the second option was needed because it differed from what was said in the employment agreement. She said her offer was made from "a genuine desire to help".

[10] She wrote that she would certainly have waited if she thought Mr Van Kuyk had left anything unsaid or that she would get some further response from him after talking on 27 March. Her 1 April email continued with this suggestion of what could be done:

This situation can be remedied by [Mr Van Kuyk] providing his feedback now with your assistance and I give you my absolute assurance that all feedback, submissions and suggestions will be considered with an open mind. In these particularly stressful times, I thought I was acting in [Mr Van Kuyk's] best interest by acting swiftly to reduce uncertainty.

[11] Mr Van Kuyk did not respond, either directly or through his lawyer, to Ms Kenderdine's suggestion of providing his feedback. On 21 April, in the absence of any further response from him, KEL processed Mr Van Kuyk's final pay. He was paid to 14 April 2020 and provided with a certificate of service. The certificate said his position was made redundant due to the "extremely adverse effect" of the Covid-19 global pandemic on KEL's business.

[12] In mid-May 2020 Mr Van Kuyk lodged an application in the Authority seeking remedies of lost wages and distress compensation for unjustified dismissal. His application said the termination of his employment was unjustified because KEL failed to consider alternatives, including applying for a wage subsidy and retaining him until Covid-19 restrictions were lifted or by reducing his hours or by suspending his pay under the terms of a pandemic clause in his employment agreement. He also claimed the dismissal was procedurally unjustified because he was not provided with financial data, selection criteria and sufficient time needed to provide feedback and propose alternatives.

[13] KEL's statement in reply said its decision was made for necessary business reasons during the Covid-19 crisis, it believed Mr Van Kuyk had provided his feedback and he had not taken the opportunity offered on 1 April for KEL to review that decision in light of whatever else he wanted to suggest.

The Authority's investigation

[14] Written witness statements were lodged for the investigation meeting from Mr Van Kuyk, his wife Kristine Van Kuyk, Ms Kenderdine and Christopher McKenzie. Mr McKenzie is a director and shareholder of Professional Lighting Services Limited (PLSL), a company that operates together with KEL. The two companies provide lighting and other specialised equipment to the theatre, television and film industries.

[15] Each witness attended the Authority investigation meeting. Under oath or affirmation they confirmed their written statements and, where asked, gave further oral evidence by answering questions from me and the parties' representatives.

[16] The representatives also gave oral closing submissions at the end of the investigation meeting. However a debate had developed during the meeting about the official advice and information that was available at the time that KEL made the offer of seeking a wage subsidy for Mr Van Kuyk and in the following two weeks treated as the notice period. In an attempt to resolve some points in dispute on that issue, arrangements were then made for counsel to seek copies of relevant web pages and notices with a view to then making submissions about what those additional records might disclose. This exercise subsequently proved more complex and challenging than counsel or I had anticipated. Several months passed before counsel, with diligence and patience, were each able to identify and obtain records from the relevant government departments and web archives. Counsel then attended a further session of the investigation meeting, held by audio visual link, to discuss those records and make submissions on what weight that information might have in resolving issues requiring determination.

[17] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. While not all evidence

and submissions received is recorded in this determination, it has nevertheless been carefully considered in reaching the findings and conclusions made.

The issues

[18] The issues requiring investigation and determination were:

- (i) Was KEL's decision to disestablish the workshop supervisor position held by Mr Van Kuyk made for genuine business reasons?
- (ii) Was the process of making that decision and dismissing Mr Van Kuyk on those grounds done fairly?
- (iii) Were alternatives to that decision and to dismissing Mr Van Kuyk on the grounds of redundancy fairly considered?
- (iv) If KEL was found to have unjustifiably disadvantaged and/or dismissed Mr Van Kuyk in what it decided and how it do so, what remedies should be awarded to him, considering:
 - (a) Lost wages; and
 - (b) Compensation under s123(1)(c)(i) of the Act?
- (v) If any remedies are awarded, should they be reduced (under s124 of the Act) for any blameworthy conduct by Mr Van Kuyk that contributed to the situation giving rise to his grievance?
- (vi) Should either party contribute to the costs of representation of the other party?

The commercial rationale

[19] Ms Kenderdine's evidence showed KEL had a compelling commercial rationale for rapidly re-organising its business in March 2020, including by reducing staff costs where possible. Bookings for its services providing lighting and other specialist equipment were being cancelled as the pandemic began to affect live events and film work. In assessing future prospects Ms Kenderdine and Mr McKenzie identified 14 positions, and the employees in them, as holding the skills and experience they would need to rebuild the joint business that KEL and PLSL operated once a widely-forecast recession resulting from the pandemic eased. They deferred plans for appointment of a new sales representative and identified two positions that the business, in bare necessity, could operate without. One of those roles was the workshop supervisor position, held by Mr Van Kuyk. The other role was an assistant storeman.

[20] Mr Van Kuyk's evidence did not effectively challenge KEL's rationale that two other long-serving workshop employees could complete most necessary work in that part of the business while the supervisory and certifying work he did could be completed by others. He had shorter service than those two workshop employees and they were paid lower rates than he got as a registered electrician. Ms Kenderdine accepted that length of service and wage costs had been part of KEL's evaluation and both were factors to which, in the circumstances at the time, an employer acting fairly and reasonably could have regard and give weight.

[21] There was no suggestion that any ill will or other ulterior motive, such as indirectly addressing performance issues, had any part in the view reached that the business could operate effectively without the position held by Mr Van Kuyk and one other employee once pandemic restrictions were lifted.

The opportunity to respond

[22] What was legitimately at issue, as a matter affecting the justification of what KEL decided and how it did so, was announcing a decision on the redundancy of that position before the deadline set for feedback had been reached.

[23] Ms Kenderdine and Mr Van Kuyk largely agreed in their accounts of their discussion by telephone on 27 March. He had worked for the business for a little over four years by that time. She was apprehensive about having to call and explain KEL was looking at laying him off. At the time Ms Kenderdine rang she had not yet sent her 27 March letter, headed "Potential Restructure", but used points covered in it as the basis for what she said. Mr Van Kuyk told her that he had expected she was going to say KEL had decided to close the company and acknowledged it was a difficult time for her as well. He also told her he "would be alright". Shortly after the call Ms Kenderdine sent Mr Van Kuyk an email attaching her letter and a copy of his employment agreement. Both the letter and the email referred to noon on 31 March as the deadline for any responses from him, either by email or by telephone call.

[24] The letter Ms Kenderdine sent Mr Van Kuyk on 30 March, advising of the redundancy decision, began by thanking him for his "graciousness in your handling the news around this redundancy process". As later became apparent, she had mistaken his courtesy during their conversation on 27 March for concurrence. While her impression may have been understandable, and genuinely reached, it had resulted in KEL curtailing

the opportunity for Mr Van Kuyk to respond. While Mr Van Kuyk listened and talked politely to Ms Kenderdine during their telephone conversation on 27 March, he had not, at that time, yet received and considered her letter. In those circumstances it could not fairly be assumed he might not have more to say. As such going ahead with a decision, and advising him of it on 30 March, was a defect in KEL's redundancy process. If such a defect was more than minor and resulted in Mr Van Kuyk being treated unfairly, the Authority could find that action of the employer was unjustifiable when measured against the statutory standard.¹

[25] One measure for determining whether Mr Van Kuyk was treated unfairly by that curtailed opportunity for response was to consider what may have happened if the counterfactual situation, of him providing a response, had occurred. He said he had prepared a letter to send to Ms Kenderdine by 31 March. He did not provide a copy of that letter as part of his evidence for the Authority investigation. As best he could recall his letter had asked why one of the other workshop positions would not be made redundant, rather than his, and referred to his understanding that the business needed to have a registered electrician available on site to certify lighting repair work done by workshop staff. However Mr Van Kuyk accepted, in his oral evidence, that he did not know the comparative costs or savings from keeping other workshop staff rather than him. And, while Mr Van Kuyk questioned whether the arrangement technically met certification requirements, Ms Kenderdine understood that an external contractor who already visited the workplace regularly was sufficient to meet those requirements. Accordingly, neither factor would have made any appreciable difference to KEL's decision that it could not sustain the workshop supervisor position. On the available evidence that conclusion was one that a fair and reasonable employer could have made.

[26] The disadvantage to Mr Van Kuyk of having his opportunity to provide feedback curtailed, and the effect of it, was a sense of disappointment rather than any likely substantive difference to the outcome.

[27] However the extent of that disadvantage also needed to be assessed in light of the further opportunity that Ms Kenderdine had then offered when her error of assumption was promptly brought to her attention in Mr Van Kuyk's grievance letter of 1 April.

¹ Employment Relations Act 2000, s 103A(2), (3)(c) and (5).

[28] The purpose of the grievance process is to have any concerns addressed as closely as possible to when they arise. An employer, acting reasonably and fairly, is expected to attempt to do so in good faith.

[29] In his oral evidence Mr Van Kuyk said he had seen that later opportunity to provide feedback, and Ms Kenderdine's undertaking to genuinely consider it, as "just a false promise". He felt KEL had "already slammed the door" on him and would simply thank him for his feedback but not change its decision in any way.

[30] While such doubt or suspicion was understandable in the circumstances, Mr Van Kuyk was still an employee of KEL at that time. Like the company he had good faith obligations to be active and communicative in maintaining a productive employment relationship.² In this context that included his thoughts or insights on whether his position should be disestablished and, if so, whether that inevitably required the complete termination of his employment.

[31] Mr Van Kuyk's application to the Authority said KEL had not properly or fully considered options for applying for the wage subsidy or for using some other provisions in his employment agreement that might have allowed for his employment to be suspended for a period but not terminated.

[32] He chose, partly because he felt he was being "got rid of", not to take the opportunity for further input Ms Kenderdine offered on 1 April. That rejected opportunity reduced the extent to which Mr Van Kuyk was treated unfairly by KEL's earlier procedural flaw.

[33] The obligation on an employer making a decision that may have an adverse effect on a worker, including one where redundancy of a position is being contemplated, is not a counsel of perfection. An employer is not bound by the law to act without any flaw or failing whatsoever. Neither is a worker.

[34] Rather, the standard for assessing an employer's actions is one of reasonableness and fairness. There may be flaws or failings in the actions of an employer whose has otherwise acted fairly, reasonably and in good faith, that is without intending to mislead or deceive. Just as employers must accept not every error

² Employment Relations Act 2000, s 4(1A)(b).

committed by workers carrying out their duties is grounds for disciplinary action, so too must workers sometimes accept that not every shortcoming in why and how a decision by an employer was made and carried out is grounds for a finding of unjustified action. As s 103A(5) of the Act recognises, there is a margin of error allowed for those fumbles and stumbles that do not go so far as being unfair and being unreasonable. Having said that, the margin for misunderstanding does not extend to knowing of such a situation and not seeking to remedy it.

[35] In this case KEL did err and did seek to remedy its error but Mr Van Kuyk chose not to use that retrieved opportunity to seek to influence the outcome. The flaw of curtailed consultation was not minor but, in light of KEL's attempts to fix it, the extent or severity of that unfair treatment was of limited and narrow effect.

Consideration of alternatives

[36] The other significant element of Mr Van Kuyk's claim about the fairness or otherwise of KEL's redundancy decision and process concerned the obligation to consider alternatives to maintaining his employment. He proposed three alternatives as not properly and reasonably explored by KEL – suspending payment of his salary under a “pandemic clause” in his employment agreement; reducing his hours and salary; and applying for a wage subsidy. What the company had proposed for use of that subsidy was submitted to be improper and inappropriate.

The pandemic clause

[37] Ms Kenderdine admitted that she had not initially given any thought to use of a clause headed “Pandemic/Infectious Disease” in the employment agreement of Mr Van Kuyk and some other employees. She said this was because the company had used a ‘boiler plate’ template for the employment agreement Mr Van Kuyk had signed some four years earlier. She had not been familiar with it when she saw it again while re-reading employment agreements as part of the rapid restructuring review she and Mr McKenzie carried out in March 2020. The clause was not used in later employment agreements the company had made with staff. And in March 2020 she discounted use of that clause because she did not consider it was fair to affected staff.

[38] The clause purports to have secured the employee's agreement to forfeit an entitlement to wages or salary for the period of any enforced closure of the business premises “due to a Ministry of Health directive or other government initiative intended

to isolate or control an infectious disease”. It also said the employer would consider but be under no obligation to agree to any request to use accrued leave entitlements in that period. There must be considerable doubt that any such clause would, in any event, have been lawful and enforceable because it appeared to be an attempt to contract out of minimum employment standards. It was not a failure of fairness to discount using that clause to stop paying Mr Van Kuyk for the indefinite period of a lockdown. And, as Ms Kenderdine explained in her oral evidence, its use for that period would not have resolved the business needs for which she and Mr McKenzie were preparing in their restructuring exercise. At the time an extended period of recession was forecast to follow the lifting of restrictions and they were concerned to contain their wage bills sufficiently for the business to endure through that subsequent uncertain period, not just the lockdown.

Reducing salary and hours

[39] Mr Van Kuyk suggested he could have retained his employment by agreeing to work reduced hours and thereby receiving a lower salary. While Ms Kenderdine accepted that she would have, at least, considered any such suggestion Mr Van Kuyk made, he had an opportunity to put that proposal, after 1 April and did not use it. However, even if he had done so, it was unlikely to have been a viable alternative given the assessment KEL had made about the two lower paid roles of other experienced staff being able to meet its needs.

Use of the wage subsidy

[40] Mr Van Kuyk submitted KEL failed to act fairly and reasonably by not seeking the Covid-19 wage subsidy to keep him as an employee for the entire period that the emergency restrictions may have been in place. He criticised what KEL did propose as a ‘fraud’.

[41] Those allegations needed to be assessed in a way that paid close attention to the element of the statutory test of justification that refers to what a fair and reasonable employer could have done “in all the circumstances at the time”.

[42] Having carefully weighed all the evidence, and being mindful of the pressures on businesses and their staff in those particular weeks of 2020, I could not reliably conclude KEL’s proposal to Mr Van Kuyk about extending his notice period

deliberately sought to use the wage subsidy scheme in a way contrary to the government's intention or rules of the scheme at that time.

[43] Counsels' careful collation and analysis of the official information publicly available to employers and others about the rules and operation of the scheme from March 2020 onwards showed that by September at least there was much more detailed guidance about how redundancy and notice periods were to be treated. However, in the more frenetic days of March and early April 2020, the descriptions given were broader and open to wider interpretation and application, without any attempt to be deceptive.

[44] On 27 March the information available on the MSD website said only that employers receiving the subsidy were required to agree to make "best efforts" to keep staff for whom it was paid and to pay them at least 80 per cent of their normal wage.

[45] On 29 March the Employment New Zealand website, maintained by the Ministry of Business, said the scheme was to support employers adversely affected by Covid-19 so they could continue to pay their employees and to ensure workers continued to receive an income, even if they were unable to work. It also contained the sole specific reference to redundancy situations around this time: "It is also available to employers who recently let employees go because of Covid-19, provided they re-hire those employees".

[46] In that context, KEL's proposal to Mr Van Kuyk that they continue his employment through an extended notice period was not inconsistent with the broad description of the requirements of the scheme publicly available at that time.

[47] Even on a more technical analysis, Mr Van Kuyk's employment was not ended on 30 March and an extended period in which he might receive the wage subsidy was not a 're-hiring'. Ms Kenderdine's 30 March letter advised him that his position was to be disestablished but it gave no specific date on which his employment was to end as KEL was first canvassing his view on two options, with different time periods that might apply. The date of 31 March referred to in the letter was the time by which he was asked to indicate a preference for one or other option. No date from which notice would then run, and his employment would end, was set by that correspondence.

[48] Even if that description were not accepted, there was also the reasonable prospect that Mr Van Kuyk could have addressed any doubt about how a wage subsidy

might legitimately be sought and paid if he had taken up Ms Kenderdine's offer on 1 April to provide his "feedback, submissions and suggestions" that she had undertaken to consider with an open mind.

[49] In that context, there was no established failure to consider alternatives to the extent that a fair and reasonable employer could have done in all the circumstances at the time.

Conclusion on personal grievance application

[50] For the reasons given Mr Van Kuyk failed to establish that KEL's decision to disestablish his position on the grounds of redundancy amounted to an unjustified dismissal.

[51] He was, however, subjected to an unjustified disadvantage during the course of the process that KEL followed, to the limited extent described earlier in this determination. Consideration of a remedy for that disadvantage was required.

Remedies

[52] As the termination of Mr Van Kuyk's employment on the grounds of redundancy has not been found to be an unjustified dismissal, no remedy for lost wages was open to him.

[53] Neither could Mr Van Kuyk be compensated for the general upset that being dismissed on the grounds of redundancy during that difficult period, as that outcome did not result from an unjustified action of KEL. For reasons already given, assessment of the remedy for the unjustified disadvantage he did suffer during the process that led to his dismissal had to be limited to the sense of disappointment he experienced because of the curtailed consultation opportunity.

[54] Relevant to that assessment was Mr Van Kuyk's own evidence, given during the investigation meeting, that the outcome was something he had expected anyway. He recounted a discussion with another worker two days before his 27 March telephone conversation with Ms Kenderdine. Mr Van Kuyk said he told the other worker that he "thought it was possible the workshop might lose one person and it might even be me".

[55] However it was clear from Mr Van Kuyk's evidence that he was upset and disappointed by losing the opportunity to provide his feedback before a decision was

made. This resulted in an injury to his feelings and some loss of a sense of dignity in that situation for which KEL should compensate him by payment of \$2,000 under s 123(1)(c)(i) of the Act.

[56] As required by s 124 of the Act I have considered whether Mr Van Kuyk's actions contributed to the situation that gave rise to the limited disadvantage grievance that had been accepted as established. Mr Van Kuyk was not responsible in any blameworthy way for the impression that Ms Kenderdine formed from their 27 March telephone conversation that led to her curtailing the consultation period. No reduction of remedy awarded was warranted on that ground.

Orders

[57] For unjustifiably disadvantaging Mr Van Kuyk during its restructuring process, KEL must pay him \$2,000 as compensation under s 123(1)(c)(i) of the Act. The compensation must be paid to him within 28 days of the date of this determination.

Costs

[58] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[59] If they are not able to do so and an Authority determination on costs is needed, the following timetable for lodging memoranda will apply. If Mr Van Kuyk seeks costs, on the basis of having successfully established a disadvantage and being awarded a remedy, he may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum KEL would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[60] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.³ As a preliminary indication, subject to any submissions made, it may assist the parties to know that this appears to be a matter to which the Authority's usual daily tariff for a one day investigation meeting could

³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

fairly apply, notwithstanding some additional investigation meeting time was required after research on a disputed point was completed. That initial view is, of course, also subject to weighing other factors such as the effect that prior settlement offers, if any were made, must have on that assessment.

Robin Arthur
Member of the Employment Relations Authority